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No. 83-1606

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

JOHN B. KENNEDY,
Petitioner

v.

THE BOARD ON PROFESSIONAL RESPONSIBILITY OF THE SUPREME COURT OF DELAWARE AND THE SUPREME COURT OF DELAWARE,
Respondents

On Petition for a Writ of Certiorari to the Supreme Court of the State of Delaware

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED FOR REVIEW

1. Is it a denial of due process to a respondent in a lawyer disciplinary proceeding if a Board member sitting as an adjudicator in his case is also assigned to investigate and present evidence in another completely unrelated case against the same respondent during the same time period?

2. If the Rules relating to discovery before the Board on Professional Responsibility do not accord precisely the same discovery procedures to the respondent as to the investigating attorney, does this necessarily constitute a denial of due process in this case?

3. When a responding attorney before the Board on Professional Responsibility defies the Board and refuses to answer pending discovery, and is notified, as a result, to appear for a hearing on contempt, is it a denial of due process for the Board subsequently to recommend discipline based on that contempt?

4. When an attorney, more than one month after being notified of the date for a disciplinary hearing in his case, applies for a continuance on the grounds that after receiving such notification his counsel undertook another engagement, is it a denial of due proess to refuse that continuance when that responding attorney has ample time to retain alternative counsel the case being one not involving complex issues of fact or law?

5. In an attorney discipline proceeding is it a denial of the right to due process not to provide a separate hearing, in addition to the hearings already held before the Board on Professional Responsibility and the Delaware Supreme Court, for the presentation of evidence and/or argument on the nature of the discipline to be imposed, where such a separate hearing is not requested in the proceedings below?

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BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

Statement of the Nature and Stage of the Proceeding

This is a petition for a writ of certiorari to review an Opinion and Order of the Supreme Court of Delaware dated January 24, 1984 suspending the petitioner from the practice of law for two years, and to review the subsequent order of that Court of February 9, 1984, denying

a motion for reargument, a motion for hearing en banc, and a request for stay of discipline.

This is the answering brief of the Board on Professional Responsibility of the Supreme Court of Delaware and of the Supreme Court of Delaware. While the Supreme Court of Delaware itself is named as a nominal respondent, the petition does not define what, if any, role it should play in that capacity, although of course any writ of certiorari which issues would be directed to the Supreme Court of Delaware.

Statement of Facts

It is important to recognize that in this case the Delaware Supreme Court was dealing with four separate and distinct cases involving petitioner John B. Kennedy (hereinafter "petitioner"). This fact is obscured by the apparent series of typographical errors in the reprinting of the opinion, since the headings of the separate cases are omitted in the appendix to the petition as indicated below. Very briefly summarized, these cases are as follows:

1. Everett — No. 204, 1982. In this case petitioner was charged with failure to file a routine affidavit of dependency in Family Court litigation, as required by 13 *Del. C.* §1512(b), and with filing a deficient affidavit for counsel fees, followed by a failure by petitioner to take any steps to cure the deficiencies after opposing counsel and the Court called it to his attention. The case further involves the failure of petitioner to file a motion for reargument to notify his client of the situation, or to tell her that the effect might be to destroy her rights to support, petitioner's refusal to file a protective appeal at the request of his client (petitioner demanded payment in advance before taking any such step), together with petitioner's refusal to give the file on the case to another attorney (who had been asked by the cli-

ent to rectify the situation) unless petitioner was paid in advance, coupled with petitioner's refusal to submit a statement for the fees which he claimed to be due. Finally, the case included reference to petitioner's refusal to release the file until payment was made for photocopying, and until the client gave him a general release.

2. Book — No. 205, 1982. At page 5a[1] of the Petition's Appendix a line has been omitted which should appear above the title "FINDINGS OF FACT" reading: "As to representation of Robert A. Book (No. 205, 1982)." (The line has been tacked on the end of the previous paragraph.) This case involved petitioner's entering into a 40% contingent fee contract for the collection of Workmen's Compensation relief, followed by petitioner's charging his client, in fact, a 50% fee although the relief for the client was being paid without any contest or dispute, and without the need to file suit (although a petition with the Industrial Accident Board was, in fact, filed). Petitioner's involvement had no impact whatsoever on the payment. Further, petitioner imposed additional charges even over and above the 50% fee, including charges for office visits.

3. Tingle — No. 60, 1983. At page 11a, there is an introductory line omitted which should appear above the words "COUNT I" reading: "As to representation of Clara Tingle (No. 60, 1983)." (This line has been tacked on the end of the previous paragraph.) This case involved petitioner's rude and offensive conduct towards the witnesses, the prosecuting officer and the judge during a trial, including harassing of petitioner's own client on the witness stand to the extent that she "broke down"

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1. References to the Appendix to the Petition are designated with the page number and a lower case "a": "5a".

and was driven to the "verge of hysteria." See page 11a. Thereafter, petitioner tried to persuade his client to sign an affidavit swearing "that she was happy with his services." See page 12a.

4. Failure to respond to subpoenas of the Board — No. 75, 1983. This case related to procedures before the Board in 11 cases other than the cases discussed above. Petitioner was disciplined based on the finding of the contempt of the Board.

As noted below, certain of the issues arise only in one or more of these cases, but not in all. As we understand it (though this is not clear to us from the Petition), petitioner's Point I (commingling of functions) relates only to Case 204; Point II (invalidity of the discovery rules) relates only to Case 75; Point III (notice of contempt charge) relates also only to Case 75; Point IV (denial of a request for a continuance) relates only to Case 60; while Point V (absence of an additional, separate hearing on the nature of the discipline to be imposed) relates to all four cases, Nos. 205, 204, 75 and 60.

SUMMARY OF ARGUMENT

1. This Petition does not involve a situation where the same person served as prosecutor and judge in the same case. Here, while two Board members who sat at the hearing in Case 204 later served in two unrelated cases (60 and 205), they were acting in No. 60 and No. 205 not as prosecutors but solely for the purpose of investigating and presenting evidence. Further, even when there has been a commingling of functions in an agency such as this, this Court has held that there is no denial of due process when there is no evidence to overcome the presumption of honesty and integrity in those serving as adjudicators.

2. Petitioner had adequate means for developing

the evidence on his side of the case, and therefore the difference between the discovery rights given to the Board and those given to petitioner did not result in a deprivation of petitioner's right to due process.

3. While the hearing before the Board was directed to finding petitioner in contempt, the Board was perfectly within its rights in also recommending subsequently that the contempt be considered by the Delaware Supreme Court as a basis for discipline.

4. There was no abuse in the Board's exercise of its discretion in denying petitioner's attorney's application for a continuance of the hearing in Case No. 60 when that attorney never even requested a continuance until one month after he had received notice of the hearing, and the basis of the request was that the attorney desired to attend a matter which had been scheduled after he knew of the Board hearing date. There was no denial of right to counsel, a right to confront witnesses, or a right to a fair trial in such circumstance, particularly since petitioner had more than adequate opportunity to obtain substitute counsel and petitioner willfully left the hearing in defiance of a subpoena compelling his presence.

5. Petitioner's belated complaint that he is entitled to an entirely separate and additional hearing, after a finding that discipline is warranted, to present evidence and argue about the type of discipline which is to be imposed, is without merit, particularly since petitioner had more than adequate opportunity to make such arguments both before the Board and before the Supreme Court of Delaware in connection with his discussion of the case generally.

ARGUMENT

Introduction

The petitioner in this case has, regrettably, largely ignored the Opinion of the Supreme Court of Delaware in presenting his contentions to this Court. As a result, findings and conclusions by the Delaware Supreme Court, and authorities cited by it, go largely undiscussed and unrebutted. The Delaware Supreme Court Opinion itself thus provides a largely unchallenged answer to petitioner's contentions. Therefore, in discussing those contentions here we will be, in large part, furnishing answers which the Delaware Supreme Court had already furnished before the petition was filed.

Petitioner relies throughout his petition on an observation from this Court's opinion in *In re Ruffalo*, 390 U.S. 544 (1968), to the effect that disciplinary proceedings are "quasi-criminal" in nature. That may be true, but where does it lead? Even if disciplinary proceedings are "quasi-criminal" it is perfectly clear that that does not mean all the elements of criminal procedure and law are incorporated into them. *In re Oxman*, 496 Pa. 534, 540, 437 A.2d 1169, 1172 (1981), *cert. denied*, 456 U.S. 975 (1982) ("It is now well-established that not all constitutional protections afforded defendants in criminal cases apply to disciplinary proceedings.") Thus it is simply a *non sequitur* to assert that because a given rule is applicable to a criminal proceeding it is therefore applicable to a discipline proceeding which is of a quite different nature, where the principal objective is to protect the public, and punishment of an offending member of the bar is merely incidental. *In re Weinstein*, 254 Or. 392, 394, 459 P.2d 548, 549 (1969), *cert. denied*, 398 U.S. 903 (1970).

I. IT IS NOT A DENIAL OF DUE PROCESS FOR A BOARD MEMBER TO ACT AS AN ADJUDICATOR IN ONE PROCEEDING AND TO INVESTIGATE OR PRESENT EVIDENCE IN A SEPARATE, UNRELATED PROCEEDING INVOLVING THE SAME ATTORNEY.

The Delaware Board on Professional Responsibility, an arm or agency of the Superme Court of Delaware, is made up of unpaid attorneys designated by the Delaware Supreme Court to serve in this capacity. The procedures of the Delaware Board on Professional Responsibility contemplate that when a complaint is brought to the attention of the Board it will initially be assigned to an attorney who is a member or associate member of the Board for investigation. That attorney, who thereafter may take no part in the actual adjudicatory functions of the Board in that case (See Rule 5, page 53a) completes an investigation, then reports to the Board so it can determine whether there is probable cause necessitating a hearing. Rule 5, page 53a.

In this particular series of cases involving a high volume of complaints against a single member of the Bar, in order to divide up the work of investigating and presenting evidence among the members of the Board, it became necessary to assign those cases to various different Board members. As a result, as the petition alleges, F. Alton Tybout did sit in the hearing on case No. 204 on May 12, 1981, and did later, namely in the following year, present evidence against petitioner in the hearing on the unrelated case No. 205 on April 15, 1982. Similarly, O. Francis Biondi sat in the hearing on case No. 204 on May 12, 1981, and was, a year later, involved in presenting the evidence on the unrelated case No. 60 in April and May of 1982 when the hearings on those cases were scheduled. Only case 204 is involved in this aspect of the Petition, as we understand it. Petitioner does not charge (and did not charge in the court below)

that in cases 60, 205 and 75 there was any member of the panel who was also an investigator.

Petitioner also appears to complain at P-6[2] of the "ex parte review by the entire Board without participation or even presence of the petitioner." That review, however, was confined to a consideration of whether or not a rule to show cause should issue. Even in criminal proceedings, where stricter rules pertain, the accused does not normally participate in grand jury proceedings or deliberations in the District Attorney's office relating to the initiation of a prosecution. Petitioner offers no authority as to why a different rule should pertain here. Instead, petitioner seems to suggest that the members of the Board are "tainted" by having participated in such a proceeding, and later sitting in review at the actual hearing of the charges. Petitioner offers no reason why the "taint" exists in this case, and would not exist when a judge presides over the empaneling of a grand jury, or over proceedings relating to the suppression of evidence, or motions to dismiss, and later presides at a trial. This Court has previously considered and rejected just such a contention in *FTC v. Cement Institute*, 333 U.S. 683 (1948). "[T]he fact that the commission had entertained such views as the result of its prior *ex parte* investigations did not necessarily mean that the minds of its members were irrevocably closed on the subject of respondents' basing point practices." *Id.* at 701. *See also NLRB v. Donnelly Garment Co.*, 330 U.S. 219, 236-237 (1947); *Withrow v. Larkin*, 421 U.S. 35, 55-57 (1975).

Further, the fact that after all of the proceedings were concluded before the Board of Professional Responsibility, and the matter was then presented to the Delaware Supreme Court, Mr. Biondi acted as the representative of the Board on Professional Responsibility to present the matter to the Supreme Court does not, in some sort of retroactive way "taint" the impartiality of

2. References to pages in the Petition are: "P-6".

Mr. Biondi when he had previously sat as a member of the Board on Professional Responsibility. His role in the Delaware Supreme Court was not that of prosecutor, but as Board representative and attorney presenting the case for decision.

As the Delaware Supreme Court points out (p. 18a), the petitioner conceded that the Board Rules contain strict safeguards preventing commingling of the three functions — investigative, prosecutorial, and adjudicative — in the same case, and these Rules were followed in each case involving the petitioner. See also Rule 5 at p. 53a. Thus petitioner's complaint is confined to the situation where Messrs. Biondi and Tybout, who sat on the panel adjudicating case No. 204 on May 1981, also subsequently investigated and presented evidence in entirely different cases against this petitioner (205 and 60) in April and May of 1982 before the issuance of the draft report on 204 on June 17, 1982.

This contention was analyzed by the Delaware Supreme Court, and rejected on the basis of the doctrine in *Withrow v. Larkin*. In that case, as the quotation by petitioner at P-9-10 indicates, this Court noted that such a contention (there in the context of a physician's objecting, in a proceeding to revoke his license, that the same members both investigated and adjudicated the case) has a "difficult burden of persuasion to carry." 421 U.S. at 47. No evidence was presented by Kennedy to overcome what this Court characterized as "a presumption of honesty and integrity in those serving as adjudicators." *Id. See also Schweiker v. McClure*, 456 U.S. 188, 196 (1982) ("The burden of establishing a disqualifying interest rests on the party making the assertion."); *Doraiswamy v. Secretary of Labor*, 555 F.2d 832 (D.C. Cir. 1976).

In the latter case, *Doraiswamy*, the United States Court of Appeals for the District of Columbia Circuit considered and rejected an argument almost indentical

to that now made by petitioner. There the appellant, an alien, contended that he was denied an impartial adjudicator in connection with the Department of Labor's denial of his application for certification which would permit him to obtain a job in the United States.[3] The appellant applied for certification on three separate occasions, at each time attempting to obtain certification for the same job. The officer of the Department of Labor who rejected the first two applications was subsequently promoted and served as the reviewing officer of another department official's rejection of the third application. Although the Court based its decision on an administrative regulation which required a separation of functions and not on the due process clause (although that issue was also involved — see 555 F.2d at 843), the Court first analogized to the due process clause's requirement of an unbiased adjudicator, and then continued:

> The obvious purpose of the regulation is to bar an officer from reviewing his own decision, and the certifying and reviewing functions in regard to Laos' third application were performed by different officials. Each of the three applications inaugurated an independent proceeding; each review was directed exclusively toward the certifying officer's initial decision on a particular application. When White served as reviewing officer on the third application, the issue concerned Ms. Richardson's denial of that application and not White's rulings on the two prior applications.
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> * * *
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> These precedents, we think serve well to guide the decision now to be made. They teach that the

3. 8 U.S.C. §1182(a) (14) provides that aliens can enter the United States to perform labor only if the Secretary of Labor certifies that American workers are not available for the job and that wages and working conditions of similarly employed American workers will not be adversely affected.

> statute works a disqualification of an appellate judge only when an appeal involves a question decided by the judge at the trial level. We think the Secretary's regulation, which seeks for administrators what the statute exacts for federal judges, should be given the same construction. While the three applications on Lao's behalf sought the same type of certification and the supporting arguments echoed a familiar theme, the central question on each application was the sufficiency of Honeywell's showing of the unavailability of American workers for the post that Lao wished to permanently fill. *That demonstration varied factually, though unsuccessfully, as on each application Honeywell strove to improve it. White, as reviewing officer on the third application, thus faced no action which he took on either of the two prior applications.* We hold that the regulation was not violated.

Id. at 843-45 (emphasis added).

Here, too, each of the proceedings involving petitioner varied factually and legally. Petitioner has not carried his burden of proving that the procedures utilized by the Board create a risk of actual bias and prejudgment sufficient to overcome the presumption of honesty and integrity on the part of Board members. *See Withrow v. Larkin;* 421 U.S. at 47; *Martin-Trigona v. Underwood,* 529 F.2d 33 (7th Cir. 1975); *Schweiker v. McClure,* 456 U.S. at 195-96; *United States v. Perlstein,* 126 F.2d 789, 806 (3d Cir.), *cert. denied,* 316 U.S. 678 (1942) (Circuit judge designated to preside at criminal trial where defendants were convicted, but on appeal convictions were reversed. The judge did not take part in the retrial, but he did sit as a member of the court which heard the appeal from the convictions on retrial, and this procedure was held appropriate). *See also Noah v. United States,* 316 F.2d 159, 160 (9th Cir.), *cert. denied* 375 U.S. 855 (1963); *In re Oxman,* 496 Pa. at 544-45, 437 A.2d at 1174.

None of the cases upon which petitioner relies are applicable to this case. First and foremost, in each of those cases the alleged commingling occurred in the investigation and hearing of the same facts and charges. The Board's Rules admittedly prevent that here. And, in *Tumey v. Ohio*, 273 U.S. 510 (1927) cited P-8, this Court invalidated an enforcement procedure on due process grounds because the judge hearing the case had a direct pecuniary interest in the number of convictions he rendered. The case of *In re Murchison*, 349 U.S. 133 (1955), relied on at P-8-9, and involving a contempt proceeding, has recently been further clarified by this Court in rejecting a similar effort to rely on it:

> Appellee relies heavily on *In re Murchison, supra*, in which a state judge, empowered under a state law to sit as a "one-man grand jury" and to compel witnesses to testify before him in secret about possible crimes, charged two such witnesses with criminal contempt, one for perjury and the other for refusing to answer certain questions, and then himself tried and convicted them. This Court found the procedure to be a denial of due process of law not only because the judge in effect became part of the prosecution and assumed an adversarial position, but also because as a judge, passing on guilt or innocence, he very likely relied on "his own personal knowledge and impression of what had occurred in the grand jury room," an impression that "could not be tested by adequate cross-examination." 349 U.S. at 138.

Withrow v. Larkin, 421 U.S. at 53.

Plainly enough, *Murchison* has not been understood to stand for the broad rule that the member of an investigative agency may not investigate facts, institute proceedings, and then make the necessary adjudications.

The Supreme Court of the United States has con-

sidered an argument of alleged commingling of functions by quasi-judicial administrative bodies on at least eleven separate occasions. In not one instance has this Court found the challenged procedure to be a violation of due process. 3 K. Davis, *Administrative Law Treatise* §18:2 (2d ed. 1980). Indeed, this Court's Opinion in *Withrow v. Larkin* reveals a long and unbroken line of decisions holding that it is no denial of due process *even* for the same persons to serve as both investigators and adjudicators in the *very same proceeding*. Thus, it is clearly no denial of due process in this case, where the Board Rules provide the additional safeguard of preventing members from performing dual functions in the same case. See Board on Professional Responsibility Rule 5, page 53a (Petitioner has evidently copied an earlier version of this Rule, and the current version refers to the "Board on Professional Responsibility" instead of to the "Censor Committee", the previous name of the same agency).

Further, petitioner's attempt to distinguish *Withrow v. Larkin* was considered by the Court below and rejected. Petitioner there contended that *Withrow* allowed a commingling of "investigative" and "adjudicative" roles, but not "prosecutorial" and "adjudicative". However, as the Delaware Supreme Court noted, Board members are acting as investigators, not prosecutors. The mere presentation of the evidence collected does not make that individual a prosecutor. *See Matter of Duncan*, 541 S.W.2d 564, 568 (Mo. 1976).

Finally, it is significant that only the Supreme Court of Delaware can make a final decision on the imposition of discipline, and therefore any commingling of functions is even further removed from the final decision making process. *Matter of Duncan*, 541 S.W.2d at 568.

II. THE DISCOVERY PROVISIONS OF THE RULES ARE NOT UNCONSTITUTIONAL.

Beginning at P-15 petitioner contends, with respect to No. 75, that the discovery rules of the Board on Professional Responsibility violate his right to due process by denying him reciprocity of discovery and shifting the burden of proof and therefore, he argues, they are invalid and he did not need to comply with them. However, petitioner was provided with adequate rights to obtain evidence and with adequate protection. As the Delaware Supreme Court noted (p. 27a), Rule 11 of the Board provides that:

> Any person complained against shall have the right to defend against the charge by the introduction of evidence and the right to be represented by counsel and to examine and cross-examine witnesses. He shall also have the right to the issuance of subpoenas for the attendance of witnesses to appear and testify or for the production of books and records.

Also, Rule 10 gives the respondent a right to seek an appropriate order to compel "the testimony of a witness residing out of the State by deposition or otherwise."

Finally, under Rule 5 petitioner has a right to apply "to the full Board . . ., for a protective order, and the Board . . ., for good cause shown, may quash or modify the subpoena or grant protective relief from the interrogatories." See 53a (unfortunately, as we have noted, the appendix to the Petition copies an earlier version of the Rules, when the Board on Professional Responsibility was named "Censor Committee.")

In any event, since this is not a criminal proceeding petitioner is not entitled to full reciprocity of discovery, and the discovery rules of the Board on Professional Re-

sponsibility are therefore valid. *See In re Oxman*, 496 Pa. at 540-541; 437 A.2d at 1172.[4]

Finally, even if, contrary to our contentions, there were some merit to petitioner's argument here, petitioner was still properly disciplined here since he chose merely to defy the discovery requests rather than to seek a protective order. *See United States v. United Mine Workers of America*, 330 U.S. 258, 293-94 (1944).

III. THE PETITIONER WAS CLEARLY NOTIFIED OF THE CONTEMPT PROCEEDING, AND IT WAS ON A FINDING OF CONTEMPT THAT THE BOARD URGED HE BE DISCIPLINED.

This particular part of the petition relates to No. 75 only. Petitioner claims there was a violation of due process because he was never notified prior to the hearing on 75 that he was charged with a discipline violation because of his defiance of the discovery procedures, and instead understood he was facing only a contempt procedure. He further finds discipline inappropriate because he said he relied on the advice of counsel.

However, petitioner misconceives what happened in this situation. Petitioner received ample notice of the behavior which was to be the subject of the hearing before the Board. And, prior to the final hearing in the Supreme Court he was notified that that conduct had led to a recommendation of discipline (See 17a) by the Board's Final Report which recommended discipline based on the contemptuous behavior of petitioner in failing to answer subpoenas and interrogatories. No other finding stands in the Final Report and all evidence substantiates that the respondent was on notice that he might be

4. Petitioner relies on *Wardius v. Oregon*, 412 U.S. 470 (1973), but that was a criminal, not an attorney discipline proceeding, and related to Oregon's special rules applicable to alibi defenses. We know of no authority requiring reciprocity of discovery in discipline proceedings.

disciplined because he willfully failed to answer the subpoenas and interrogatories. As was stated in *Javits v. Stevens*, 382 F. Supp, 131, 139 (S.D.N.Y. 1974), listing the Canons adds nothing to a petition where the facts are alleged adequately. As the Delaware Supreme Court noted, this was not a recommendation for discipline based on a finding of a disciplinary violation under the Code of Professional Responsibility.

The Delaware Supreme Court noted that disciplinary processes, although they may overlap contempt sanctions to some degree, are designed to focus on protection of the public from lawyers whose conduct falls below that prescribed by the Code of Professional Responsibility. The contempt in failing to respond to proper discovery called into question petitioner's fitness to practice law, and must be weighed in determining the discipline to be imposed. Thus, the contempt finding was properly considered by the Court below in determining petitioner's fitness to practice law. 33a.

IV. THE BOARD'S EXERCISE OF ITS DISCRETION IN DENYING PETITIONER'S REQUEST FOR A CONTINUANCE DID NOT DENY PETITIONER HIS RIGHT TO COUNSEL, HIS RIGHT TO CONFRONT WITNESSES OR HIS RIGHT TO A FAIR TRIAL.

Petitioner's complaints relating to the continuance request concern only the Tingle case, No. 60. The facts, as related at P-4-5 and P-19-21, and also in the Delaware Supreme Court Opinion, disclose that petitioner had some six months notice that possible charges against him were pending, and he made no request for a continuance until after one month following receipt of notice that the hearing date had been set. He had two weeks' notice that his application for a continuance had been denied but there is no evidence in the record that he made any effort whatsoever to obtain substitute counsel. See 29a. Further, and perhaps most important, the

application for a continuance was presented because petitioner's counsel desired to attend to another matter which, in fact, was scheduled after he learned of the scheduling of the discipline hearing. The Board felt that any request for a continuance should be made to those organizations which subsequently created the conflict and not to the Board.

It appears to be undisputed that the grant or denial of a continuance of this kind is a matter of discretion. *Raymond Heartless, Inc. v. State*, 401 A.2d 921 (Del. 1979); *Blackledge v. Commonwealth*, 62 Pa. Commw. 188, 435 A.2d 309 (1981). *See also Martin v. State*, 433 A.2d 1025, 1034 (Del. 1981). Accordingly, a decision denying a request for a continuance will not be disturbed unless that decision is unreasonable, arbitrary or capricious. *Ungar v. Sarafite*, 376 U.S. 575 (1964); *Morris v. Slappy*, ____ U.S. ____, 103 S. Ct. 1610 (1983). This rule is equally applicable to professional disciplinary proceedings. *Bar Ass'n of Baltimore City v. Cockrell*, 270 Md. 686, 313 A.2d 816 (1974); *Blackledge v. Commonwealth*, 62 Pa. Commw. at 191; 435 A.2d at 311.

Further, the right to counsel is not to be interpreted as a right to any specific counsel. In *Hodge v. Hodge*, 507 F.2d 87 (3d Cir. 1975) the Court of Appeals stated that:

> The refusal to grant a continuance is not, without more, a denial of the right to counsel even though the refusal prevents a party from being represented by a particular attorney because of that attorney's other professional commitments.
>
> * * *
>
> The rule in this circuit . . . is that "although the right to counsel is absolute, there is no absolute right to a particular counsel."

507 F.2d at 90 (citations omitted).

Unfortunately, although the *Hodge* Opinion, and the above quotation, were relied on by the Delaware Su-

preme Court in its Opinion here attacked by petitioner, petitioner does not even mention the case or the quotation in the petition.

Petitioner could have obtained substitute counsel in the two weeks available to him. Petitioner complains that "there was no inquiry by the Board as to the time needed either for new counsel or for petitioner's counsel to be present." P-24. However, that is because petitioner simply chose to defy the Board and leave the hearing voluntarily. See page 29a. The claims in No. 60 relating to the outrageous behavior of petitioner in a magistrate's court were simple and straightforward both factually and legally (see above Statement of Facts), so there would have been ample time for a substitute attorney to prepare the case.[5] As the Delaware Supreme Court noted (p. 29a) the facts were not novel, and no special expertise was required. Petitioner's failure to try to get other counsel does not constitute any denial of a right to counsel. *See Ungar v. Sarafite,* 376 U.S. at 590 (five days to obtain other counsel to defend criminal contempt charge is not a denial of due process.)

As to petitioner's contention that there was a lack of confrontation, it should be noted again that petitioner voluntarily left the hearing, thereby defying a subpoena commanding him to appear and testify. Thus he was solely responsible for the determination not to have substitute counsel appear, and not to confront the witnesses himself. Under these circumstances he cannot properly complain about the situation of his own creation.

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5. The charges against petitioner arose out of his conduct at a trial which lasted approximately three hours and involved four principal actors. Moreover, petitioner had knowledge of the expected testimony of those witnesses, as early as October 8, 1981, when he received a letter from Mr. Biondi in which Mr. Biondi set out a detailed summary of the statements taken from each witness. Board's Exhibit 4; Transcript page 52. *See also* Board's Exhibit 11; Transcript pages 58-59 (transmitting all exhibits to petitioner well in advance of trial).

V. THE PETITIONER HAD ADEQUATE OPPORTUNITY TO PRESENT EVIDENCE AS TO THE NATURE OF THE DISCIPLINE TO BE IMPOSED, AND PETITIONER NEITHER SOUGHT NOR WAS ENTITLED TO AN ADDITIONAL SEPARATE HEARING FOR THIS PURPOSE.

For the first time in his petition for reargument before the Delaware Supreme Court petitioner raised a complaint about not having an "opportunity to present evidence as to the nature of the discipline to be imposed". Such a hearing had not been sought before, and was not sought in his request for reargument — petitioner merely complained of the absence of such a hearing.

In fact, petitioner was not precluded at the hearing before the Board from presenting evidence as to the severity of the discipline to be imposed. Had he wished to come forward at that time with evidence of mitigating circumstances, he was free to do so. Moreover, he has cited no authority whatsoever for the proposition that due process of law mandates an entirely separate hearing directed solely toward the appropriate sanction to be imposed once a finding of unethical conduct has been made.

We submit that by not seeking a separate hearing on the nature of the sanctions to be imposed either before the Board or before the Delaware Supreme Court petitioner has waived any right he may have had to such a hearing.

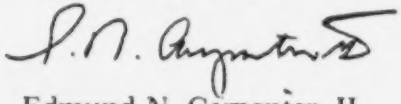
Further, we submit there does not exist any right to such a separate hearing. *In re Smith*, 75 Ill.2d 20, 25 Ill. Dec. 660, 387 N.E.2d 316, *cert. denied*, 444 U.S.841 (1979). In a discipline case, such as this, the hearing before the Board, and the hearing before the Delaware Supreme Court afford ample opportunity, in connection with a discussion of whether or not there should be any discipline to discuss all mitigating circumstances which

would have any bearing on the nature of the discipline to be imposed.

CONCLUSION

For the foregoing reasons we urge that the petition for a writ of certiorari be denied.

Respectfully submitted.



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